Supreme Court, U. S.
FILED
OCT 1 1975

No. 74-54

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

TRANSAMERICAN FREIGHT LINES, INC.,
Petitioner,

v.

BRADA MILLER FREIGHT SYSTEMS, INC., et al.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

To Brief of Respondent on the Merits

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To Brief of Respondent on the Merits

Two things which become apparent from a study of Respondent's Brief are, respondent's desire to inject for consideration and decision by this Court, issues which are not included in the question presented for review and which were not presented to or considered by the courts below, and respondent's continued insistence upon the injection into the case at this time of facts which are not relevant or material to the issue involved.

STATEMENT OF THE CASE

On page 2 of its brief Respondent, Brada, asserts that there are inaccuracies in the Statement of the Case contained in Petitioner Transamerican's brief and yet no such inaccuracies are cited or referred to. Then, in purporting to supply facts omitted from Transamerican's brief, Brada proceeds for one and one-half pages with a recitation of evidence which is disputed and which is totally immaterial to the issue before this Court.

For purposes of consideration of Brada's Motion for Summary Judgment by the District Court, the existence of a lease between the parties is assumed. Brada's "Statement of the Case" contains facts which relate only to the question of the existence of the lease, a question not material at this time. The evidence which is recited in its statement by Brada is disputed, both as to the factual content and as to the inferences which can be drawn therefrom.

In its recitation of these disputed and immaterial facts in its statement and in its argument, Brada has failed to advise the Court that the evidence in this case also shows that for a long period of time prior to the January 22, 1968, occurrence in this case, Brada had trip-leased vehicles with drivers to Transamerican and had entered into thirty-one such leases during the two years prior to this occurrence. Transamerican's reliance upon the word of the drivers in these various leases was never questioned by Brada. (See Appendix filed in the United States Court of Appeals for the Seventh Circuit in the within action, pages 45-108.) During that period of time Brada was paid over $5,000.00 by Transamerican for those trip-leases. (Appendix, Seventh Circuit, pages 110-112.) Additionally, Brada willingly accepted payment from Transamerican for the very lease involved in this case and Brada's records show that the check given them by Transamerican for this lease clearly described the purpose of such payment. (Appendix, Seventh Circuit, pages 119, 366, 380.)

The trip-lease to Transamerican in the present case took the Brada truck and driver from Detroit to Kansas City. At the conclusion of this trip the Brada driver picked up a load *for Brada* and carried it on his return trip to Detroit. (Appendix, Seventh Circuit, page 334.)

Transamerican apologizes to the Court for the necessary reference to evidence not contained in the Appendix filed herein. As stated, however, all of this evidence is immaterial to the issue presented at this time and in the preparation of the Appendix it was not felt necessary to include this evidence.

ISSUES NOT INCLUDED IN QUESTION PRESENTED

Brada's Motion for Summary Judgment stated, "That the pleadings, depositions, answers to interrogatories and exhibits on file show that the indemnity provision of the trip-lease, set out in paragraph 3 of Amended Crossclaim of Defendant Transamerican Freight Lines, Inc., is contrary to public policy and is unenforceable." (A. 91). This was the issue presented to the courts below (Appendix to Petition A-1 through A-13.). Brada's position has been that this issue was determinative of the case regardless of the other facts. This position has been supported by the decisions of the District Court and the United States Court of Appeals for the Seventh Circuit. Brada now wants this Court to decide the validity of clauses in the lease between the parties other than the indemnity provision (Respondent's brief 12-15) and Brada is also asking this Court to rule that the driver of the truck was not Brada's employee. (Respondent's brief 14-17, 23-27). Neither of these issues was decided by the courts below nor are they included in the question presented to this Court for review. The decisions below were based solely upon the holding that the indemnity provision in and of itself was invalid because it violated the control and responsibility provisions of the I.C.C. regulations.

REPLY TO ARGUMENT

Further comments are necessary with regard to certain specific statements contained in Respondent's brief.

On page 7 of its brief in considering the control and responsibility provisions of the I.C.C. regulation Brada states that Transamerican "argues" that it had control and Transamerican "interprets" the facts as placing control with Transamerican. For purposes of this case, the question of control and responsibility by Transamerican was not merely an argument or an interpretation of Transamerican. That Transamerican had control and responsibility was a conceded fact. In its Memorandum filed with the District Court Brada stated, "In addition, Transamerican did in fact exercise complete control over the driver Hardrick * * *." (A 95) and further, "Transamerican does not dispute, indeed there could be no dispute, that Transamerican had complete control of the truck and driver and complete responsibility 'for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission' (Trip Lease, paragraph 4)." (A 97)

The District Court in its opinion stated "Transamerican contends that in the present case it had complete control and responsibility for the tractor and trailer covered by the lease, and Brada Miller does not dispute this contention for purposes of this hearing." (Appendix to Petition, A 4.)

On page 8 of its brief Brada argues that to require the lessee to bear the ultimate financial responsibility for injury caused by a negligent driver will promote highway safety. We fail to see how it would be conducive to highway safety if the driver of the

truck and his full-time employer, the lessor, were to be unaccountable financially while all of the responsibility was left to the lessee who may never see the driver involved after the conclusion of a single trip and who has no means of employee discipline.

On page 9 on its brief Brada argues that to uphold the validity of an indemnity agreement where there has been compliance with the I.C.C. regulations would encourage violations of the regulations and that a claim of control by the lessor would permit it to avoid the indemnity agreement. This is a specious argument. It is based upon the assumption that either an actual exercise of control by the lessor or a claim by the lessor that it exercised control over the driver would be sufficient to avoid an indemnity agreement. Actually, it is the conduct of the lessee which is important under the regulations. We submit that, if anything, such a rule would encourage more precise compliance by lessees as a group and certainly the courts would not permit a lessor to defend an indemnity claim against him with the claim that he was otherwise in breach of the contract.

From page 12 through page 17 of its brief, Brada has set forth a series of arguments contending that the lease agreement between the parties was invalid for reasons separate and apart from consideration of the indemnity agreement. Brada contends that various provisions of the lease agreement other than the indemnity clause also violate the I.C.C. regulations. As we have stated previously in this Reply Brief, these contentions are not contained in Brada's Motion for Summary Judgment, have not been considered or ruled by the courts below and are not included in the question presented for decision here. Also, consider Brada's contention in its Memorandum of Law filed with

the District Court that "Transamerican's printed form of trip-lease conforms to the I.C.C. regulation * * *." (A 94)

In quoting paragraph numbered 1 of the lease on page 12 of its brief Brada has omitted important language. The requirement that the truck be operated by Hardrick is omitted in Brada's brief as also is the more important requirement that the transportation follow without deviation the authorized routes of Transamerican.

Nothing in this paragraph detracts from the required control and responsibility assumed by Transamerican and in fact the contrary is true. Transamerican's control over the service is emphasized by the requirement that Transamerican's authorized routes be followed.

The remaining clauses of which Brada complains were also contained in the leases in the Alterman, Jones and Carolina Carriers cases. See *Allstate v. Alterman*, 465 F.2d 710, l.c. 712, 713, *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100. Appendix to Petition for Writ of Certiorari pending in this Court Number 74-973, Appendix E page A-23, *Carolina Freight Carriers Corporation v. Pitt County Transportation Company*, 492 F.2d 243, l.c. 244. As pointed out in both Petitioner's brief (Note 1, page 11) and the Brief of the United States and the Interstate Commerce Commission (page 16) the Commission has stated that an authorized carrier furnishing services in vehicles owned and operated by others must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public and the Commission for the transportation.

None of the paragraphs of the lease of which Brada complains detract from Transamerican's control of the service or from Transamerican's responsibility to the shipper, the public and the Commission. The lease requires certain performance

on the part of the lessor. However, it is important to note that Transamerican remains responsible to the shipper, to the public and to the Commission for any failure on the part of Brada to perform these things required of it by the lease. At the commencement of the lease, Transamerican had made the appropriate thorough inspection of the leased equipment and had assumed responsibility to the public for such equipment. The lease requirement that Brada thereafter maintain the mechanical condition of the vehicle does not alter Transamerican's responsibility. If Brada were to make faulty repairs which would then cause an accident, Transamerican would remain responsible to the public for Brada's carelessness. For the lease to require mechanical maintenance by the lessee would open the door for all manner of over-reaching and imposing. For the use of a vehicle for one trip a lessee might find himself paying a large sum of money to repair a transmission breakdown, for example, or some other item of major repair providing a windfall benefit to the lessor. Presumably the rental rates for the lease of the equipment are adjusted to cover the cost of normal maintenance.

In the Allstate case, *supra*, the lessor challenged a similar maintenance provision of the lease agreement. The decision in that case upheld the propriety of the provision. *Allstate v. Alterman*, 465 F.2d, l.c. 713.

At several places in its brief Brada makes argument with regard to the status of the driver and the relationship of the driver to the lessor and lessee respectively. (Respondent's brief 14-18, 23-27.) As stated previously herein, this subject is not appropriately covered in the question presented to this Court and the question has not been considered or ruled upon by the courts below.

In any event, it appears that Brada's entire arguments on this subject are directed to a consideration of Brada's relationship to the public through the driver. Brada's argument seems to be based upon a contention that the driver was not within the scope of his employment by Brada during the lease, therefore Brada could not be liable to an injured third party because of the driver's negligence and therefore Brada could not be liable to Transamerican by virtue of the contract. This argument is erroneous. First, there is ample evidence to show that the driver was within the scope of his employment for Brada. Clearly, this does not conflict with the control and responsibility of Transamerican which is provided for by the lease agreement and by the I.C.C. regulations. Second, the contractual provisions of the lease agreement are clear in their intent and thoroughly describe the relationship between the parties and the driver as intended by the lease.

What was the relationship between Brada and the driver Hardrick? Hardrick was a full-time employee of Brada. He was a regular employee of theirs before, during and after the lease. Except for an advance to the driver to cover expenses of the trip, the payment for the lease of the equipment with driver was made by Transamerican to Brada. Transamerican is not to pay the driver's salary, the lease providing that the entire cost of the operation should be Brada's. The lease provides that Brada will pay all of the federal or state withholding taxes, assessments, unemployment insurance, old age insurance, or other social security payments on Hardrick's wages or other earnings.

Brada apparently takes the position that the driver must be operating as an employee for either the lessor or the lessee but cannot be employed by both. The cases which Brada cites on this proposition do not support its position. Referring to the case of *Simmons v. King* (5th Cir. 1973), 478 F.2d 857, the court stated at page 867 that "* * * the I.C.C. carriers' liability

for equipment and drivers covered by leasing arrangements is not governed by the traditional common law doctrine of master servant relationships and respondeat superior." The court held that because of the lease and of the regulatory requirements the driver became the statutory employee of the lessee. The court however did not stop there. In addition to considering the relationship between the driver and the lessee, the court also held that the lessor could still be likewise liable and stated "This is not as incongruous as might be supposed. I.C.C. can mandate a positive legal responsibility which we uphold in the only way it would be meaningful—to give protection to the injured member of the public. At the same time (lessor) has, or may have, a practical control over (driver) of a kind which would not allow it to obtain an automatic insulation from liability from the mere terms of a lease between the two parties." *Simmons v. King, supra,* l.c. 867. To the same effect is *Carolina Casualty Insurance Company v. Transport Indemnity Company* (10th Cir. 1973), 488 F.2d 790, where the court held the driver to be a special employee of the lessee while he was a general employee of the lessor.

Brada cites the case of *Brannaker v. Transamerican,* (Mo. 1968), 428 S.W.2nd 524, in support of its position that only one employer can be liable for the acts of a servant. It is interesting to note that cited in the Brannaker case is the case of *Vance Trucking Company v. Canal Insurance Company,* D.C., 249 F. Supp. 33 (Affirmed 395 F.2d 391). The Vance case holds that in a case involving a lease of trucking equipment with a driver, the driver could be the employee of both the lessor and lessee and both could be liable for his acts.

Thus, it appears that Brada is mistaken as to its basic premise and in fact Brada could be liable to an injured third party for the acts of the driver while the truck was being operated under the lease.

Even so, the relationship between the parties is determined by the clear intent of the provisions of the lease agreement. While there is no doubt that by the terms of the regulations and by the terms of the lease agreement Hardrick was a statutory or special employee of Transamerican to the extent and for the purposes for which that relationship was created. It is also clear that Hardrick was a regular employee of Brada and that Transamerican entered into a lease agreement with Brada which provided for the lease of equipment as well as for the services of the driver. Transamerican paid Brada for a driver to drive the equipment as well as for the equipment itself. There is nothing inconsistent in referring to the driver as the lessor's employee and in requiring indemnity from the lessor for negligence of the driver employee of the lessor who was furnished by the lessor and for whose services the lessor has been paid. The language of the contract provides that as between Brada and Transamerican, the driver was to be considered Brada's employee.

ADDITIONAL AUTHORITIES

Two related cases have been decided since the filing of the briefs in this case and we cite these cases here to provide additional information for the Court.

Indiana Refrigerator Lines, Inc. v. Dalton, (6th Cir. 1975) 516 F.2d 795. The United States Court of Appeals for the Sixth Circuit in this case has followed its prior decisions and has upheld the validity of an indemnity agreement in a lease of equipment similar to that in our present case.

The United States Court of Appeals for the Seventh Circuit on August 11, 1975, decided the case of *Watkins Motor Lines, Inc. v. Zero Refrigerated Lines.* This case involved an indemnity agreement in an interchange agreement as distinguished from a trip lease such as is involved in our present case. The Watkins

case upheld the validity of the indemnity agreement. The Watkins case is not yet reported and the opinion is included as Appendix A to this Reply Brief.

CONCLUSION

Since the indemnity clause contained in the lease agreement between the parties was not in violation of the I.C.C. regulations, it is again respectfully submitted that the judgment below should be reversed and this case remanded for a trial on the merits.

Respectfully submitted

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APPENDIX

In the United States Court of Appeals for the Seventh Circuit

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Nos. 75-1183, 75-1184

Watkins Motor Lines, Inc., a Freight Corporation, The Insurance Company of North America, a Pennsylvania Corporation, and Waco Fire and Casualty Company, a Pennsylvania Corporation,

Plaintiffs-Appellants-Cross-Appellees,

v.

Zero Refrigerated Lines, a Texas Corporation,

Defendant-Appellee

and

Continental National Assurety Corporation, an Illinois Corporation; and Continental Casualty Company and Bankers and Shippers Company of New York,

Defendants-Appellees-Cross-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Northern Division—
Nos. 73 C 1517, 74 C 2212
Richard B. Austin, *Judge*

Argued June 9, 1975—Decided August 11, 1975

Before Clark, *Associate Justice**, Bauer, *Circuit Judge* and Grant, *District Judge.***

Per Curiam:

This is a diversity action brought by appellant Watkins Motor Lines (Watkins) and its insurance carrier against appellee Zero Refrigerated Lines (Zero) and its insurance carriers, seeking indemnification for damages. On cross-motions for summary judgment, the United States District Court for the Northern District of Illinois found for Zero. We affirm.

In January, 1968, Watkins and Zero entered into an interline agreement for the interchange of equipment which provided for the interchange of traffic with one company's equipment along with the other company's routes. Up to April, 1974, there had been approximately 750 exchanges of equipment between Watkins and Zero, including those pursuant to a supplementary agreement in February of 1972. An indemnification contract was signed concurrently with the original interline agreement and was rewritten on June 2, 1971. This indemnification agreement was required by Zero before it would agree to interchange traffic and equipment with Watkins and provided that Watkins would hold Zero and its insurance underwriters "harmless of any liability in connection with the use and operation of automotive equipment" by Watkins over routes on which various motor carrier regulatory bodies had authorized Zero to operate.

In February of 1972, Watkins contracted to haul a shipment of Girl Scout cookies from Elizabeth, New Jersey, to Tucson, Arizona, and assigned one William Nixon to make the delivery. Previously, Watkins, which did not have sufficient equipment

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

** Senior Judge Robert A. Grant, United States District Court for the Northern Division of Indiana, is sitting by designation.

to handle all of its shipments, had entered into a long term lease with Nixon to make available his tractor trailer rig on a "trip lease" basis. The cookies were loaded onto Nixon's rig which bore the Watkins interchangeable name plate. Nixon and his co-driver, David Reynolds, left for Arizona on February 23, 1972 on a through bill of lading. Since Watkins' Certificate of Public Convenience permitted carriage of goods only as far as Dallas, Texas, the company arranged with Zero to have the truck continue from Dallas to Tucson under Zero's name, pursuant to the standing interline agreement. This was accomplished through the fiction of an equipment lease by which Zero "rented" the truck from Watkins for two days, receiving the fee for carrying the cookies from Dallas to Tucson but paying for the "rental" to Watkins. Upon its arrival in Dallas, Zero inspected the equipment, changed the Watkins nameplate to Zero's own, and signed the appropriate papers covering the "rental" of the equipment and drivers through to Tucson.

On February 28, 1972, a fatal traffic accident occurred in Tucson while the tractor trailer rig was being operated by Reynolds. As a result, a wrongful death action was filed against Watkins and Zero in Phoenix. It was later settled for $575,000 with the burden split by the respective insurance carriers as follows: $300,000 by Zero's and $275,000 by Watkins'. Subsequently Zero filed a suit in the U. S. District Court in the Eastern District of Pennsylvania seeking indemnity for the $300,000 which it paid. That action was transferred to Chicago and consolidated with a similar suit filed by Watkins against Zero which was then pending.

Watkins then filed a motion for summary judgment claiming that it was entitled to indemnity from Zero under the rule announced by this Circuit in *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). The district court found *Alford* inapposite because the earlier case involved trip lease agreements under 49 C.F.R. §1057.4, while the present case dealt with an inter-

change of equipment under 49 C.F.R. §1057.5. The district court therefore entered a judgment against Watkins on its motion for summary judgment and for Zero on its counterclaim. A summary judgment against Watkins was entered for $300,000 in favor of Zero's insurers, Bankers and Shippers Company of New York ($100,000) and Continental Casualty Company ($200,000).

After this appeal was filed but before it was argued, the Supreme Court granted a writ of certiorari in *Transamerica Freight Lines v. Brada Miller Freight Systems*, No. 75-54. In that case, this circuit cited *Alford v. Major* in issuing an unpublished order striking down an indemnity clause in a lease of a tractor-trailer whereby the lessor agreed to hold the lessee harmless for any negligence of the lessors or its agents and to indemnify the lessee from any claims arising out of any injury sustained through any negligence of lessor or its agents or employees. It is not insignificant that three other circuit courts have handed down decisions conflicting with *Alford*. *See Jones Truck Lines, Inc.* v. *Ryder Truck Lines, Inc.*, 507 F.2d 100 (6th Cir. 1974); *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.*, 492 F.2d 243 (4th Cir. 1974); *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.*, 465 F.2d 710 (5th Cir 1972).

Although it might be the better part of valor to hold this case pending the Supreme Court's examination of the *Alford* rationale in *Transamerica*, we have concluded that *Alford* is inapposite here, regardless of what the Court may do. *Alford*, as did *Transamerica*, *Jones Truck Lines*, *Carolina Freight Carriers*, and *Allstate Insurance*, dealt with a trip lease under 49 C.F.R. §1057.4, not an equipment exchange under §1057.5. This is significant because it is only within the former regulation that the requirement of "complete assumption of responsibility * * * by the lessee for the duration of said contract, lease or other arrangement." 49 C.F.R. §1057.4(a)(4).

When Watkins dealt with Zero, it was acting under §1057.5, which has no provision comparable to §1057.4(a)(4). The requirements for an equipment exchange under §1057.5 appear to have been met, and we perceive no bar to the indemnification agreed upon by the parties. It is true that it was Zero's certificate under which the shipment was moving at the time of the accident, but, as we view it, Watkins retained control of the equipment and, quite logically, retained responsibility for its use. If there is a public policy argument in this case, it lies with Zero, for to release Watkins from liability might encourage recklessness in driving on the part of the actual operators of trucking equipment. Since highway safety is one of the paramount goals of the regulations involved, it follows that the indemnity agreement serves a useful purpose and must be upheld.

Affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.